CHAPTER 6

THE SOURCES:
INSTITUTIONAL PROCESSES

The SAHRC believes that issues presenting immediate harm to the affected communities and a perceived lack of trust in the relationships developed to undertake the relocation are symptoms of potential and possible flaws in the institutional process, underpinning the relocation or resettlement programme.

Institutional flaws are perceived to be a result of a compliance based approach to resettlement management. There is at the moment a gap in the international approach to resettlement planning between processes which comply with legislation and project requirements and those approaches which seek to push beyond compliance. This latter approach is based on a developing understanding that current legislation and project requirements do not necessarily ensure that risks associated with resettlement are fully mitigated, especially risks of potential human rights violations. The SAHRC suspects that what appears to be a compliance based approach to resettlement employed by PPL has been shown to be insufficient in mitigating the risks that such a process invariably creates.

6.1 Process documentation (including reporting)

6.1.1 Observations

The SAHRC is concerned at the lack of specific resettlement planning documentation.

6.1.2 Explanation

Resettlement planning and managing the risks associated with resettlement processes

The key principle underpinning resettlement planning is the achievement of multi stakeholder agreement on all stages of the resettlement process. In anticipating resettlement, the processes by which these multi stakeholder agreements are to be achieved are often outlined through a Resettlement Action Plan ("RAP"). Using a thorough collection of baseline data to indicate key impacts and risks a RAP addresses each stage of an anticipated resettlement process to delineate the key agreements which have to be achieved with all stakeholders to mitigate the risks associated with the process. There is as yet no obligation for resettlement project sponsors to develop this type of plan, unless bound under strictures of international debt financing, for example through the World Bank/ International Finance Corporation ("IFC").

The SAHRC have tried to engage PPL on whether they were obliged to comply with IFC standards through debt financing programmes; However, this issue is as yet unresolved. Anglo Platinum stated that:

- It had contracted Golder Associates Africa (Pty) Limited in 2000 to prepare, in addition to an EIA, a "Relocation Action Plan in accordance with World Bank Standards";[145]
- "At the time of the scoping and EIA exercises only the World Bank Resettlement Guidelines were in existence. The International Finance Corporation Guidelines were only released in April 2006. Regard was had to the latter after its promulgation, particularly as regards Post Relocation Action Plans";[146]
- In response to whether Anglo Platinum was required to comply with the World Bank Directive on Involuntary Relocation they stated that "[t]here have been no involuntary resettlements. The relocation was unanimously agreed to by the Community;"[147] and
- In response to whether Anglo Platinum was required to comply with standards prescribed by its parent company Anglo American Plc they stated that "these were

[145] Anglo Platinum response of 6 June 2008, at para 24.1.
[146] *Idem*, at para 25.
[147] *Idem*, at para 21.1.

not in existence at the time the relocation was scoped."[148]

There is no indication as to whether Anglo Platinum has since been bound by any parent company standards, whether attempts were made to make any amendments to plans developed at the time of scoping in order to comply with any standards later developed by Anglo American – simply a statement that they did not exist at the time of scoping.

However, in the spirit of moving beyond compliance, the SAHRC is extremely concerned that considering the risks associated with this particular resettlement the project sponsor does not appear to have developed a document which in pre-empting the resettlement includes impact identification and risk mitigation programmes and detailed plans as to how multi stakeholder agreement on each stage of the resettlement process will be achieved.

The SAHRC is furthermore concerned that through constant communication with PPL assertions were made that a RAP had been developed. However, what was submitted to the SAHRC on 13 June 2008 by PPL was a brief Environmental Management Plan ("EMP") and a statement maintaining that:

"As regards the RAP please note that following the completion of the EIA, which identified management actions, an environmental management plan was compiled to address social and environmental issues. This plan, along with agreements signed with the Langa traditional authority in July 2005, make up the action plan against which the communities are being relocated."[149]

In further requests for clarification the SAHRC acknowledged receipt of the EMPR and relocation scoping report, but requested that Anglo Platinum supply the SAHRC with "the separate RAP developed that highlighted the potential impacts and associated risks posed to the community as a result of relocation and outlined management plans to mitigate such risks."[150]

Anglo Platinum replied that:

"The SAHRC is referred to the EIA Scoping Report by Wates, Meiring and Barnard dated October 2003. Section 8.3, Table 4 contains the 'Ímpact Evaluation for the relocation of Ga-Puka and Ga-Sekhaolelo Communities'. No independent RAP document containing potential impacts and associated risks posed to the Community has been finalised."[151]

The relocation process was initiated in 1998, when PPL approached the Tribal Authority to enter into negotiations over the proposed relocation. The development of a thorough RAP should have been initiated before this initial contact was made. Instead, documentary processes, which are being presented in lieu of a RAP were not undertaken until 2002, the same year that the project sponsors sought to achieve community consent, four years after the process had started. By this time affected communities were under the perception that the relocation was inevitable and their agency in the decision making process had been effectively removed.

The SAHRC is therefore concerned that these documents are being submitted as a RAP when they are in fact management plans to identify and mitigate risk, not detailed plans on how to achieve multi stakeholder buy in on each stage of the relocation process.

In the absence of such documentation, the SAHRC is concerned that such plans underpinning such processes were not

148 *Idem*, at para 21.2.

149 Correspondence of 13 June 2008 from KHL Attorneys on behalf of Anglo Platinum.

150 SAHRC request for information from Anglo Platinum, 25 July 2008, at para 4(d)(i).

151 Anglo Platinum response of 6 June 2008, at para 20.

developed creating a resettlement process which was therefore reactionary rather than proactive.

The SAHRC does, however, welcome receipt of the EMP of 2002. Although environmental and social risks are analysed together, the report does clearly identify major risks associated with resettlement and details measures implemented to mitigate those risks.

A small milestone which the SAHRC specifically wishes to acknowledge is the provision by Anglo Platinum of the relevant Social and Labour Plan, the first of its kind which the SAHRC has been provided access to.

6.1.3 Links to potential human rights violations

A lack of open and clearly delineated resettlement planning has the potential to undermine the whole process through a lack of multi stakeholder buy in.

There is the possibility that a lack of resettlement planning can create an ad hoc and reactionary approach to risks emerging out of the process. This can have a very real impact on the risk of human rights violations, the exacerbation of existing vulnerabilities and create an environment of uncertainty for affected communities.

6.1.4 Regulatory framework

International best practice

Whilst seeking to comply with South African legislative requirements, the overarching frame of reference for relocation is the policies, directives and guidelines of the World Bank Group ("WBG"). The key documents with reference to involuntary relocation are:

» World Bank Operational Policy 4.12 ("OP 4.12) on Involuntary Relocation;
» World Bank Procedure 4.12 ("BP 4.12") on Involuntary Relocation; and
» IFC Performance Standard 5 on Land Acquisition and Involuntary Relocation.

World Bank OP and BP 4.12 on Involuntary Relocation

World Bank OP and BP 4.12 require that involuntary relocation should be avoided or minimized wherever possible. Where this is unavoidable, relocation plans incorporating provisions for development must be formulated and widely consulted upon.

IFC Performance Standard 5 on Land Acquisition and Involuntary Relocation

The IFC is in the process of introducing revised policies and standards in the context of social and environmental sustainability. A draft document entitled Policy and Performance Standards on Social and Environmental Sustainability was released in September 2005. This document will be the base for the formal policies and standards adopted in 2006.

Eight Performance Standards ("PS") underpin the new policy. These are:

» PS 1: Social and Environmental Assessment and Management System;
» PS 2: Labour and Working Conditions;
» PS 3: Pollution Prevention and Abatement;
» PS 4: Community Health and Safety;
» **PS 5: Land Acquisition and Involuntary Relocation;**
» PS 6: Conservation of Biodiversity and Sustainable Natural Resource Management;
» PS 7: Indigenous Peoples; and
» PS 8: Cultural Heritage.

Performance Standard 5 addresses involuntary relocation and builds on earlier WBG policies and directives (particularly Operational Policy 4.12). As was the case under the earlier safeguards, PS 5 seeks to provide a framework for the responsible and transparent management

of involuntary relocation and economic displacement. In addition, it strengthens and clarifies many areas. These include scenarios of involuntary relocation, negotiated settlement (as opposed to expropriation), living conditions at relocation sites, the loss of collective assets, cash compensation, entitlements, security of tenure and private sector responsibilities under government-managed relocation. An important change introduced in terms of PS 5 is the clarification of planning requirements for physical displacement and acquisition of land rights through eminent domain (expropriation) on the one hand, and for transactions that do not involve the physical displacement of people. In the former case a RAP is required. For the latter situation, the client is required to develop compensation procedures that meet the requirements of Performance Standard 5.

Sequencing for relocation

The IFC Handbook on Resettlement proscribes a generic framework model by which relocation should be undertaken according to international best practice.

- Step 1: Determine the scope of the land acquisition/ define project area of influence and all potential socio-economic impacts within that area;
- Step 2: Select relocation sites as appropriate;
- Step 3: Select and justify land acquisition and economic displacement alternatives that minimize adverse environmental impact and relocation in the context of IFC policies;
- Step 4: Carry out socio–economic and other related surveys as required;
- Step 5: Establish legal framework for RAP; identify gaps between IFC policy and local requirements;
- Step 6: Develop and consult with Project Affected Persons ("PAPs") on entitlements;
- Step 7: Design restoration/ development interventions in consultation with PAPs;
- Step 8: Establish and verify monitoring and evaluation indicators;
- Step 9: Consult and establish a grievance mechanism; and
- Step 10: Assign implementation and monitoring responsibilities.[152]

6.1.5 Steps already taken to address the issue

The SAHRC undertook various communications and requests for clarification with Anglo Platinum through KHL Attorneys in order to better understand the resettlement planning process. Relevant clarifications provided by Anglo Platinum are stated above, but did not significantly add to the SAHRC's understanding of the planning processes undertaken.

6.1.6 Recommendations

The SAHRC recommends:

- The progression from a compliance based approach to resettlement to embracing a proactive risk mitigation approach through pre-emptive planning and documentation in line with the latest World Bank and IFC guidelines and standards. This incorporates a substantive, comprehensive stand alone RAP. This further requires that planning and consultation with communities take place in order not to undermine community perceptions as to their own agency in the process. Communities should ultimately be empowered to actively participate in processes that affect them, have certainty as to possible outcomes, processes and grievance redress mechanisms.

[152] *IFC Handbook for Preparing a Resettlement Action Plan*, available athttp://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_resettle/$FILE/ResettlementHandbook.PDF (hereinafter referred to as "IFC Resettlement Handbook").

6.2 Monitoring

6.2.1 Observations

The SAHRC is keen to better understand the monitoring processes, which have been implemented by PPL to better enable it to understand how the relocation has preserved or improved the quality of the lives and livelihoods of those being relocated.

The SAHRC is concerned that a possible lack of consistent monitoring of the relocation process may have resulted in discontent and not may allow negative perceptions of the relocation process to be adequately addressed and fed into the ongoing process.

6.2.2 Explanation

Processes by which monitoring is undertaken throughout the relocation are usually established during the resettlement planning stages. Procedures are therefore implemented acknowledging the particular sensitivities of the process which allow the project sponsors to monitor progress, including community perception, at every stage of the resettlement process. In the absence of such monitoring procedures, issues emerging are likely to remain unaddressed, or not effectively addressed.

Monitoring relocation is fundamental at all stages of the relocation process, but most particularly at the end of the process to allow the project sponsors to assess the extent to which the relocation has preserved or improved the quality of lives of those relocated.

The collection of baseline information is fundamental for the monitoring process as it gives the baseline characterisation of the quality of lives and livelihoods against which comparisons at various stages of the project can be made to assess progress. From this baseline information collection the most crucial is the census. This should provide the project sponsors and those planning relocation with quantitative data that enables them to budget resources and services. Furthermore, surrounding information gathered during the census can be used to create indicators by which the relocation targets of income restoration and sustainable development can be measured.

PPL have demonstrated their collection of baseline information and the SAHRC is engaged further with them to better understand how this information is being used to measure the progress and implementation of the relocation process. Further clarifications are provided in paragraph 6.2.4 below.

6.2.3 Regulatory framework

International best practice

Under international best practice, the IFC recommends that project sponsors "monitor and report on the effectiveness of RAP implementation, including the physical progress of relocation and rehabilitation activities, the disbursement of compensation. The effectiveness of public consultation and participation activities and the sustainability of income restoration and development efforts among affected communities."[153] More specifically the IFC recommends that project sponsors implement a coherent monitoring plan which identifies:

- Organisational responsibilities;
- Methodology; and
- Schedule for monitoring and reporting.

6.2.4 Steps already taken to address the issue

Through interactions with PPL, the SAHRC will review the monitoring plans, which have been

[153] *Idem*, at p49.

implemented by the project. However, to date the SAHRC has been unable to access these plans.

In response to a request for clarification as to how the relocation process is being monitored in order to ensure that all members of relocated communities are as well off or more well off as a result of the relocation process, Anglo Platinum stated that:

"The relocation process is being monitored by our client [Anglo Platinum], the Section 21 Companies and the community in order to ensure that there is compliance with all provisions of the legal agreements including the Construction Contract."[154]

This same question was asked of Bhadrish Daya Attorneys who replied that:

"The relocation process is monitored by ensuring that the provisions of the legal agreements are complied with. All the legal agreements, including the addenda to the relocation agreement have been approved by the communities. The project management, the operational team, the CLOs and the legal representatives of the two communities continuously monitor the relocation process to ensure compliance with the terms and conditions of the legal agreements. Furthermore, we intend to establish post relocation committees to monitor and manage community projects arising from the legal agreements. The election of such committees will be conducted by a credible outside agency in the presence of all the stakeholders. The SAHRC will be welcomed to send a representative to the inaugural meeting."[155]

This could be illustrative of a compliance based approach resulting in *ad hoc* responses to arising risks.

6.2.5 Recommendations

The SAHRC recommends that:

- PPL provides the SAHRC with all documentary evidence in relation to the monitoring process.
- PPL adheres to international best practice as outlined above in monitoring the progress of the relocation process.
- PPL link monitoring and grievance redress mechanisms to create a better understanding of how the relocation process is progressing and better allow PPL to make timely interventions to address issues emerging throughout the relocation process.

6.3 Grievance redress

6.3.1 Observations

The SAHRC is concerned that community members had no formal recourse to transparent and impartial grievance redress. Information gathered from community consultation indicates that the majority of community members believed there to be no formal process. It may be that there is a formal process in place; however, the SAHRC is unaware of it at present. The existence or not of such a mechanism is potentially immaterial for even if such a mechanism does exist the SAHRC is concerned as to:

- Why the community is unaware of it or is not utilising it effectively; and
- Why community members felt that they had to resort to protest, media contact and the employment of external legal representation to defend their interests against PPL.

154 Anglo Platinum response of 8 August 2008, at para 19.

155 Bhadrish Daya Attorneys response of 31 July 2008, at para 5.15.

The SAHRC is concerned that the grievances may have been and may currently be directed on an *ad hoc* basis in the following ways:

- To the Mapela Tribal Authority. Under the traditional structure community members take grievances to the Indunas who then take them to the MTA. In the case of Ga-Chaba the community claims that the Induna is being ignored because of his resistance to the process. This therefore results in a lack of clarity in the processes and a lack of confidence in any processes which may exist and any resultant outcomes;
- To external legal representation;
- Informally delivered grievances to the PPL Project Office at Armoede. This was formerly an *ad hoc* practice but during the July site visit of the SAHRC the community informed it and it was confirmed that the PPL Project Office was closed to community petition on every day except Fridays. The reason given was the safety concerns of the PPL employees at the Project Office. The SAHRC is not aware of the current status of this practice;
- Through community protest;
- Though the media;
- Through external NGOs; and
- Through the SAHRC.

Although these are legitimate channels, none have the capacity to effectively and in a timely manner deal with the specific issues surrounding the mine and relocation processes, which will ultimately have to be presented to PPL and the project sponsors. Many of these outlets may also increasingly create significant risks for PPL especially community protest, media coverage, and the use of external legal representation.

The SAHRC believes that if PPL had developed a sustainable, transparent and functional grievance redress process, that the possibility that these routes outlined above would not have to be employed would have been significantly reduced. For the SAHRC this is evidence enough to suggest that any grievance redress process created by PPL is not functioning effectively.

The SAHRC is further concerned that a lack of meaningful grievance redress is undermining the project sponsor's ability to monitor the relocation process.

6.3.2 Explanation

During the meeting with Anglo Platinum representatives on 21 April 2008 at Human Rights House, Anglo Platinum intimated concern at community "forum shopping" in order to secure grievance redress.

During the SAHRC site visit dated 10 – 11 July 2008, the SAHRC specifically questioned members of all communities visited on their understanding and ability to access a PPL established grievance mechanism. Some community members cited the CLOs and the ability to post ad hoc grievances to the PPL Project Office at Armoede. However, there is clearly no real and meaningful understanding of how to access grievance redress in the community.

During this visit the SAHRC witnessed the community of Sekuruwe deliver a Memorandum to the Mapela Tribal Authority (detailed in annexure 2) which listed 24 key issues, which it wanted addressing immediately. This act of community protest, which is not isolated or uncommon within this area, again reinforced the perception that institutional structures systematically dealing with grievance redress are absent from this relocation process or not functioning effectively. Further clarifications were provided by Anglo Platinum and are referred to in paragraph 6.3.4 below, but these clarifications did not alter this conclusion. Similarly, a response was provided by Bhadrish Daya Attorneys to questions posed and this is also referred to below.

6.3.3 Regulatory framework

International best practice

The IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement states that:

"The client will establish a grievance mechanism consistent with Performance Standard 1 to receive and address specific concerns about compensation and relocation that are raised by displaced persons or members of host communities, including a recourse mechanism designed to resolve disputes in an impartial manner."

6.3.4 Steps already taken to address the issue

The SAHRC has engaged community members on their ability to access grievance redress. The SAHRC then engaged with PPL to better understand any institutional process implemented to ensure that a grievance mechanism was developed to ensure that community members were able to access and seek redress on raised grievances in a timely manner.

Anglo Platinum responded to further clarifications requested by the SAHRC:

» In response to requests concerning the existence of community grievance mechanisms Anglo Platinum referred to a response to another question stating that the "Community approaches the project Management and/or CLOs and/or Section 21 representatives and/or the Operational Team and/or the Community Legal Adviser on a daily basis. All grievances are recorded and responded to";[156] and

» Documentation provided sets out the internal requirements and allocation of responsibility for dealing with external and internal communication concerning social, health and environmental issues at PPRust.[157]

However, it is uncertain how these internal allocations of responsibility translates into community grievance mechanisms; if and how this is operationalised and communicated to the community (save as described in the bullet point above); and then how external needs are translated into internal processes. Furthermore, it was not clarified by Anglo Platinum, as requested, whether other stakeholders are represented in any grievance mechanism, such as the Municipality and the MTA.

Bhadrish Daya Attorneys was also requested to provide information concerning the following:

"a. What kind of grievance and redress mechanism was created to ensure that issues raised by the affected peoples about the relocation process are lodged, addressed and answered in a timely fashion?

b. How was Anglo Platinum involved in this mechanism?

c. What is the role of the "operational team"? Please supply information on the organisational structure, role and responsibilities."[158]

[156] Anglo Platinum response of 8 August 2008, at paras 23 and 22.3.

[157] *Idem*, at para 23 and Annexure E.

[158] SAHRC request to Bhadrish Daya Attorneys for information, 25 July 2008, at paras 13(a)-(c).

They replied that this is better directed to the Project Manager, but that their firm "continues to address the grievances and plays a mediating role."[159]

6.3.5 Recommendations

- A grievance redress process is a fundamental vehicle for individual community members to voice concerns over the relocation and thereby endowing them with agency within the process. Through an understanding of traditional and customary practice, and in the knowledge that community members have sought grievance redress elsewhere, the SAHRC recommends that PPL provide clarity for the community on the mechanism created for community members to access grievance redress.
- A grievance mechanism is a key mechanism by which project sponsors are able to monitor the progress of the relocation process. The SAHRC therefore recommends that grievance mechanisms are meaningfully employed to ensure PPL is aware of developing issues which have the potential to disrupt the relocation process and thereby significantly impact upon the human rights of affected communities.
- As project sponsors, the SAHRC recommends that PPL needs to recognise its unique position in the web of relationships between stakeholders to address specific concerns on the relocation process. It therefore should seek to clarify its responsibility for grievance redress as distinct from that of other institutions such as the MTA and the Mogalakwena Municipality.
- The SAHRC recommends formal and transparent lines of communication are installed between the MTA and Mogalakwena Municipality and PPL to ensure that all relocation and mining related community grievances are delivered to the project sponsor.
- In developing and evaluating non-judicial grievance mechanisms the SAHRC recommends regard be had to the concept of "rights compatibility" of grievance mechanisms in process and substance. Developing such a set of principles and guiding points was the focus of a project of the Kennedy School of Government's Corporate Social Responsibility Initiative, Harvard University.[160] The core principles of rights compatibility in process "require that processes affecting the lives, well-being and dignity of individuals and groups should be based on inclusion, participation, empowerment, transparency and attention to vulnerable people. They also demand that any grievance process be fundamentally fair."[161] Furthermore, the grievance mechanism must be rights compatible in substance. This requires that "complaints are addressed in a manner that reflects and respects human rights, including, crucially, the right to an effective rememdy".[162]

6.4 Consultation

6.4.1 Observations

The SAHRC is satisfied that consultation structures were put in place between the project sponsors and the community as discussed further above. This has been repeatedly demonstrated through a wide range of presentations, and report documentations. The SAHRC has requested "documentation relating to the specific level of engagement

[159] Bhadrish Daya Attorneys response of 31 July 2008, at para 5.15.

[160] Corporate Social Responsibility Initiative, Kennedy School of Government, Harvard University, Rights Compatible Mechanisms: A Guidance Tool for Companies and their Stakeholders (January 2008).

[161] *Ibid*, p7.

[162] *Idem*, p8.

with affected parties e.g. meeting minutes detailing specific queries, query resolution etc to indicate the depth of consultation which should tally with the mapping of all affected stakeholders".[163] Anglo Platinum replied that the documentation relating to the numerous meetings between the s21 companies, the MDC, individual community members and other stakeholders is available for inspection by the SAHRC at the mine.[164] The SAHRC is, however, seriously concerned over community claims that despite this they maintain that they were not fully consulted on the relocation process.

The SAHRC is satisfied that affected community members had ample opportunity to raise questions and concerns throughout the relocation planning process. The SAHRC is, however, concerned over community claims that these questions and issues were in some cases not properly addressed.

The SAHRC is concerned that PPL delegated responsibility for consultation to an organisation that was potentially unable to fairly and transparently reflect the collective views of the community.

The SAHRC is concerned that the community were initially consulted under the community perception that the mine expansions would take place and therefore that the relocation was **inevitable**. This was reinforced by the perception of local, provincial and national governments, that in being aware of the proposed expansion they approved of the relocation thus giving the community the impression that they had no agency to protest.[165]

The SAHRC is further concerned that the Task Team, intended to address concerns over representation in the Motlhotlo community was disbanded and no alternative representative group has been formed as a replacement.

6.4.2 Explanation

The SAHRC acknowledges that a vast amount of community consultation was undertaken by PPL sponsored consultants and project managers in imminent anticipation of and during the relocation process. It also acknowledges that community members were given ample opportunity to voice concerns and raise major issues.

However, the SAHRC is concerned that PPL effectively delegated responsibility for this consultation to an organisation that lacked the capacity to organise itself as an open, accountable and transparent institution and which would consistently reflect the views and concerns of the community over a time period of many years. The steering committees, which evolved into the s21 companies, were delegated responsibility for consulting with their respective communities. However, these bodies had no previous experience of working on relocation or of engaging with the private sector. The details of community meetings and lists of consultations held, fly in the face of a community which became divided during the relocation process as a direct result of what they perceived as a lack of agency to voice concerns or have issues addressed by the s21 companies. The proof that the s21 companies effectively failed as a consultation vehicle for the community was the ensuing creation of

163 SAHRC request to Anglo Platinum for further information, 25 July 2008, at para 4(f)(i).

164 Anglo Platinum response of 8 August 2008, at para 22.1.

165 Founding affidavit of Malose Johannes Masubelele, *Masubelele v. PPL*, at para 42.

the MDC, the MRRC, and later on the creation and then the disbandment of the Task Team.

Task Team

Through a review of meeting minutes it seems that the work of the Task Team may have been undermined by an inability to sustainably unify the two divided factions, the MDC and the s21 companies. Through the operation of the Task Team it appears from meeting notes that the two groups were being identified as two separate units. The virtue of the Task Team appears to have been the inclusion of a wider circle of stakeholders; however, it also appears that the attendance of these stakeholders could not be guaranteed.[166]

Of even greater concern to the SAHRC is its belief that community members were consulted upon the relocation process under the **perception that the relocation was inevitable**. This is demonstrable in a series of documentation but most starkly in the minutes outlining the actions of the meeting dated 18 October 2002, at which the communities of Ga-Puka and Ga-Sekhaolelo agreed to the relocation of the Motlhotlo village. Meeting minutes state the following:

"Mr Moshabi welcomed the guests. He mentioned that today is not the day to raise complaints and that any complaint will be dealt with the following day when the community is on its own...

...Mr Mashalane was the MC for the day...He then ordered that the mine representative should stand up and tell what they are going to do there....Mr Mashalane tells people that they are not starting with the relocation process, they are actually continuing....".[167]

The relocation process had indeed been initiated over 5 years prior to the meeting of 18 October 2002. However, for many community members this was the first opportunity at which they were able to raise concerns and questions, and yet it was at this same meeting at which concerns were not accepted, that the then relocation committees asked the community to agree to the relocation and through that resolution depose themselves of their informal rights to the land. Many communities may have not known at this point that they had any agency to reject the resolution. At neither the Ga-Sekhaolelo community resolution meeting nor the Ga-Puka community resolution meeting both undertaken on the same day, did a single community member vote against the community resolution.

During site visits the SAHRC questioned various members of affected communities on the level of consultation undertaken throughout the process. Invariably community members maintained that consultation directly with PPL was limited and consultation with s21 companies was neither meaningful nor responsive.

The SAHRC is therefore seriously concerned that the affected communities were not given the opportunity to legitimately input into the relocation planning and as such have become resistant to the whole process.

The SAHRC acknowledges that it is necessary to engage further with those members of the community who are not representatives of the s21 companies, but who may be satisfied with the consultation undertaken by PPL and the resettlement process itself. No such persons came forward to the SAHRC.

166 Notes from Task Team Meeting with Project Management, 21 August 2007.

167 Minutes of a meeting of 13 October 2002 on the signing of the Tribal Resolution.

6.4.3 Regulatory framework

Domestic legislation

Mineral and Petroleum Resources Development Act, 28 of 2002.

PPL is obliged to consult with the community in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002.

See specifically and generally sections 5(4)(c), 10 and 22(4)(b) and 54 -

"5(4) No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without – (a) an approved environmental management programme or approved environmental management plan, as the case may be; (b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and (c) notifying and consulting with the land owner or lawful occupier of the land in question."

"10 (1) Within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner – (a) make known that an application for a prospecting right, mining right or mining permit has been received in respect of the land in question; and (b) call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice"

"22 (4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing – (a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39, and (b) to notify and consult with interested and affected parties within 180 days from the date of the notice."

In the event of a failure to create agreement after consultation the matter the mine is obliged under section 54 to refer the issue to arbitration to be determined by a competent court.

"54 (1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question – (a) refuses to allow such holder to enter the land; (b) places unreasonable demands in return for access to the land; or (c) cannot be found in order to apply for access.

(2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1) – (a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit; (b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act; (c) set out the provisions of this Act which such owner or occupier is contravening; and (d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.

(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or

mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.

(4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965), or by a competent court.

(5) If the Regional Manager, having considered the issues raised by the holder under subsection (1) and any representations by the owner or occupier of land and any written recommendation by the Regional Mining Development and Environmental Committee, concludes that any further negotiation may detrimentally affect the objects of this Act referred to in section 2(c), (d), (f) or (g), the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55.

(6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the reconnaissance permission, prospecting right, mining right or mining permit, the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court.

(7) The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation, in which case this section applies with the changes required by the context."

"Minister's power to expropriate property for purpose of prospecting or mining 55 (1) If it is necessary for the achievement of the objects referred to in section 2(d), (e), (f), (g) and (h) the Minister may, in accordance with section 25(2) and (3) of the Constitution, expropriate any land or any right therein and pay compensation in respect thereof.

(2) (a) Sections 6, 7 and 9(1) of the Expropriation Act, 1975 (Act No. 63 of 1975), apply to any expropriation in terms of this Act. (b) Any reference in the sections referred to in paragraph (a) to ''the Minister'' must be construed as being a reference to the Minister defined in this Act."

International best practice

A group should be established to coordinate the implementation of the RAP. The IFC recommends that this group should comprise representatives of the project sponsor, relevant government line and administrative departments, community organisations, NGOs involved in support of relocation as well as representatives of the communities affected by the project, including host communities.

The IFC also recommends the creation of Community Relocation Committees. It is crucial that these committees comprise the formal leadership of the affected population as well as representatives of interest groups within the community that may have no leadership role for example landless households, **women**, the elderly and the youth to ensure that vulnerability is not exacerbated by the process.[168]

6.4.4 Steps already taken to address the issue

The SAHRC is not aware of additional steps taken to address this issue save for various

[168] *IFC Resettlement Handbook*, pp43–45.

matters which are *sub judice* and will be addressed by the Courts.

6.4.5 Recommendations

» A representative community consultation committee should have been formulated at the start of the process which allowed for representation from all major stakeholders. This type of representation was only developed late in the process during the latter half of 2007 when community protest against the relocation process and developing conflict between the MDC and the s21 companies prompted the creation of the Task Team.

This view has been validated by the s21 companies and the MDC.

The Task Team has since disbanded and the SAHRC recommends that all stakeholders engage in developing a new relocation committee, which includes representation from all affected stakeholders to ensure meaningful and thorough representation in the process.

» The SAHRC recommends reference to international guidance through the following IFC publications:[169]
  » Stakeholder engagement: A good practice guidance for companies doing business in emerging markets; and
  » Doing better business through effective public consultation: A good practice manual.

In general, reference could be made to *Creating Successful Sustainable Social Investment – Guidance documentation for the oil and gas industry.*[170]

6.5 Achievement of consent (beyond a single fixed point in time)

6.5.1 Observations

During resettlement processes the achievement of consent is the most fundamental process in reducing risks associated with resettlement, but to ensure that resettlement can be used as a vehicle to ensure that the relocation process either maintains or improves the quality of lives and livelihoods.

The SAHRC is concerned that PPL took a compliance based approach to the achievement of community consent for the resettlement process and as such neither anticipated nor mitigated the risks associated with the possible absence, or claims of the absence of free, prior and informed consent. The SAHRC is concerned as to claims that PPL is unable to prove the achievement of free, prior and informed consent (in line with international best practice) beyond the provision of one-on-one agreements between the Project and individual community members. In light of claims made by community members that consent was elicited through duress additional documentary evidence needs to be supplied by PPL to establish the achievement of this consent.

169 http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_GoodPractice_StakeholderEngagement [accessed on 29 July 2008].

170 IPIECA (March 2008, CDA Collaborative Learning Projects), http://www.ipieca.org/activities/social/downloads/publications/SocialInvestmentGuide.pdf [accessed on 22 August 2008].

6.5.2 Explanation

Consent for relocation was achieved through two mechanisms. The first was community resolutions passed in October 2002. The second was the one-on-one agreements signed with individual households.

The SAHRC is seriously concerned that the community resolution, which effectively initiated the relocation process by community agreement to the dispossession of land, may not have signified the individual consent of all affected peoples. The resolution was passed by the majority of households in both the Ga-Puka and Ga-Sekhaolelo. This majority consent has been used as evidence of legal compliance. However, moving beyond compliance, the SAHRC is concerned that this type of consent was insufficient to mitigate the risk of eventual minority dissent against the process which we are now witnessing.

The SAHRC is further concerned that consent for the dispossession of land came after key contractors for the relocation had already seemingly been appointed thereby creating the perception in the community that the relocation was inevitable. It is claimed, but is not established as fact to the knowledge of the SAHRC, that it was under these conditions, orchestrated by the appointed project managers that the community resolutions were passed. Minutes of a meeting of 13 October 2002 at which the Community resolution was signed it was asserted that "today is not the day to raise complaints and that any complaint will be dealt with the following day when the community is on its own...today is a day for the community to sign a community resolution".[171]

It is unclear when the first opportunity for individual structural input into the process came, or whether it was in fact at the signing of one-on-one agreements. However, the relocation process had already been initiated as if individual consent had already been achieved and dissent was deemed ineffective. The majority of concerns for individuals signing one-on-one agreements were not the ending of the relocation process, but trying to ensure that assets were not lost as a result of a process, which had already been deemed inevitable.

6.5.3 Regulatory framework

There is currently international debate over the achievement of consent during the relocation processes. Domestic legislation in South Africa and in many other countries reflects a compliance based approach necessitating only that project sponsors consult with affected people. Legislation allowing for provisions of land appropriation and eminent domain are often used when community consent cannot be achieved. PPL has made it quite clear that it sought a negotiated settlement through a compensation approach to the resettlement rather than appropriation. However, to fully manage the risks associated with resettlement the SAHRC proposes that the achievement of free, prior and informed consent is the preferred and critical standard, albeit not a legally required standard under domestic legislation.

Achievement of Free, Prior and Informed Consent

- **Free** refers to the general principle of law that consent is not valid if obtained through coercion or manipulation.
- **Prior** refers to meaningful, informed consent sought sufficiently in advance of any activities by a company.
- **Informed** means that the process must involve consultation and participation by

[171] Minutes of a meeting of 13 October 2002 on the signing of the Tribal Resolution.

Indigenous peoples with full disclosures of a development activity in accessible and understandable forms to affected peoples and communities.[172]

In September 2007 the Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly of the United Nations, with South Africa voting in favour of its adoption. This was a relatively groundbreaking declaration which asserts that:

"States shall consult and operate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free, informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resource."[173]

6.5.4 Steps already taken to address the issue

The SAHRC is not aware of additional steps taken to address this issue save for various matters which are *sub judice* and will be addressed by the Courts.

6.5.5 Recommendations

- The SAHRC recommends that community members vocalise dissent earlier in the process to ensure that complaints are heard in time for effective action to be taken.
- The SAHRC recommends that PPL acknowledges the flaws identified in the achievement of the consent process and engages with all stakeholders including resistant community members in working through any stalemate.
- The SAHRC recommends that Anglo Platinum move beyond a compliance based approach in undertaking community consultation and achieving community consent and in future seek to achieve free, prior and informed consent as a key risk mitigation strategy.

[172] *Free, Prior and Informed Consent* http://www.oxfam.org.au/campaigns/mining/ombudsman/consent.html [accessed on 25 July 2008].

[173] Article 32, Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

CHAPTER 7

CONCLUSION

In addition to the specific recommendations of this report the SAHRC makes the following general recommendations and statements concerning future engagement in order to further locate this investigation in the context of extractive industry activities in South Africa and the human rights and business debate.

GENERAL RECOMMENDATIONS AND FUTURE ENGAGEMENT

7.1 Assist communities in understanding their rights and how to access them

A lack of grievance redress is a major theme emerging from the findings in this report. Institutional mechanisms that communities can access within the company have already been dealt with in the body of the report.

However, it is also crucial that individuals and individual communities are able to gain a better understanding of their human rights and how they are able to access them. One of the resounding findings of this report is that communities did not voice their concerns early enough in the process. To this end it is important to bear in mind the SAHRC's mandate to address individual complaints from affected people who believe that their human rights have been violated.

The SAHRC therefore recommends that these communities need to be made more aware of what rights they have and how they are able to access them. In this vein the SAHRC's National and Provincial offices will continue their programmes of training and awareness raising to address this particular need.

The SAHRC recommends that it would be of great benefit to affected communities if a **general education programme is conducted in all affected communities** in South Africa who have been subjected to relocation, but ideally amongst communities prior to any resettlement consultations. This education programme would have several objectives, including: human rights awareness; knowledge of all rights and obligations arising from any proposed or existing resettlement processes; knowledge of all processes including grievance redress mechanisms. It is suggested that **experienced specialist consultants** can be contracted to develop this programme, and that they take into account work undertaken by, and the experience of, existing role players such as the IFC and the World Bank. This should further be undertaken in conjunction with the SAHRC. This initiative could be **funded by voluntary contributions from extractive industry companies** operating in South Africa who have, will, or may undertake such community relocations in pursuit of mineral wealth. The implementation of this education programme should be established as the norm. This programme should also be revisited and revised annually.

7.2 Assist companies in moving beyond a compliance-based approach to resettlement

As has been demonstrated above an imperative has been created for companies to move beyond legalistic compliance when undertaking resettlement due to the risk of human rights violations and the exacerbation of existing vulnerabilities. Countless examples internationally have indicated that compliance with current domestic legislation is insufficient in mitigating the potential risks associated with resettlement. Companies need to move beyond compliance based approaches, particularly in the following areas:

- Consultation;
- Achievement of free, prior and informed consent; and
- Grievance redress processes.

The SAHRC recommends that a general human rights audit becomes a recommended standard practice for all extractive industry and other companies undertaking the resettlement of affected communities. Companies need to move beyond compliance based planning and activities in order to limit the exacerbation of existing vulnerabilities and potential human rights violations.

7.3 Assist companies in understanding the human rights implications of their behaviour and operation within their sphere of impact

This report has tried to demonstrate how social and environmental issues surrounding the operation of a mine may lead to human rights violations. Although not conferring broad obligations on the part of the company to promote, protect and respect the human rights of all individuals within its area of operations, the allegations directed at Anglo Platinum should demonstrate the reputational and financial risks of not engaging with potential human rights impacts. In many cases, mitigating human rights risk necessitates an additional layer of analysis as part of any normal risk assessment and mitigation process. However, the important issue is that in future Anglo Platinum should be able to use human rights rhetoric and additional contextual analysis to better understand how social impact issues can evolve into potential human rights violations.
In considering the human rights implications of the activities of a company, it is also necessary to cast the net wider and consider the cumulative impact of the actions of several companies upon one affected community – that actions of one company in its sphere of impact may overlap with that of another company. In this context, the SAHRC is concerned that the activities of various mining companies in the Mokopane area or elsewhere may be undertaken in isolation and their collective effect upon communities may therefore not be holistically captured and effectively addressed. This may also result in procedural confusion, where mining company X informs a community to use grievance procedure A, while mining company Y makes use of grievance procedure B for the same community, and so on. In the context of this specific investigation Anglo Platinum stated that it does interact with Lonmin Plc through various forums. However, the SAHRC recommends that as a standard practice a general forum be established of which all mining companies in the relevant area, whether operating under mining right or prospecting, be members. Additional members should include a representative of the Municipality and the Premier's Office, the Department of Minerals and Energy, the Department of Land Affairs and the Department of Environmental Affairs and Tourism, the Tribal Authority as well as members of affected communities as proposed in the report, as an addition to the Resettlement Committee.

Business engagement with human rights is an evolving field. The SAHRC has already referred to the role that Anglo Platinum's parent company Anglo American is playing in this discourse.

This report, however, demonstrates that one of the most crucial issues at play is the need for not single but multi stakeholder engagement to address alleged and potential future human rights violations at the hands of corporate actors. The United Nations Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, iterates this in the model that he created to broker a way across the impasse maintaining that:

"there is no single silver bullet solution to the institutional misalignment in the business and human rights domain. Instead all social actors

– States, businesses, and civil society – must learn to do things differently. But those things must cohere and become cumulative..."[174]

The SAHRC therefore recommends that PPL make efforts to engage in broader multi-stakeholder engagement, particularly with civil society organisations which they may misguidedly place themselves in opposition to, to manage their potential human rights impacts.

7.4 Community and legal representatives' input on what could have been done differently

During its site visits and written communications the SAHRC asked various communities, the legal representatives and structures what they think should have been done differently and what measures could have been implemented at the commencement of negotiations with affected communities to better ensure engagement with the relocation process and ensure community unity. Their **varied views** and proposals included the following:

- A "union" type of system is recommended to represent the community in addition to the Tribal Authority;
- Nothing could have been done differently and all proper procedures were followed;
- The Task Team was a positive development and steps should have been taken to ensure its continuation and effectiveness; and
- Steps should have been taken to unite the communities or to establish a structure which could have dealt transparently with differences.

[174] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (7April 2008, A/HRC/8/5).

ANNEXURE 1

Stakeholder identification

Local level stakeholders:

1. Affected communities
    - » Motlhotlo (Ga-Puka and Ga-Sekhaolelo)
    - » Ga-Chaba
    - » Ga-Molekane
    - » Sekuruwe
    - » Old Ga-Pila
    - » Resettled communities at Sterkwater, Armoede and Rooibokfontein

2. Formed stakeholder groups from affected communities
    - » Motlhotlo Relocation Resistance Committee
    - » Motlhotlo Development Committee
    - » Ga-Chaba Land Committee

3. Key relocation stakeholders
    - » Ga-Puka Relocation and Development Association (incorporated under Section 21)
    - » Ga-Sekhaolelo Relocation and Development Association (incorporated under Section 21)
    - » Minerals Committee
    - » Mapela Tribal Authority
    - » Mogalekwane Municipality
    - » Office of the Premier
    - » Anglo Platinum

National stakeholders:

1. National civil society organisations
    - » ActionAid
    - » Jubilee South Africa
    - » The Bench Marks Foundation
2. National government departments
    - » Department of Minerals and Energy
    - » Department of Land Affairs
    - » Department of Environmental Affairs and Tourism

ANNEXURE 2

Memorandum submitted by the Sekuruwe community on 10 July 2008 (direct transcript translation)

1. The community of Sekuruwe/ Blinkwater Village want to inform the Tribal Authority (Moshate) to instruct the mine to stop working at our place
2. We request the mine to stop any activities that take place at our environment
3. WE don't want to live side by side with these new mining and industrial activities
4. Houses are now cracking
5. Water will soon be polluted
6. Air pollution will cause respiratory diseases and productive land is replaced by slimes unemployed
7. There is no development for the people of this community because most of them are still unemployed
8. We assure you that will fight to put land before mining and people before profit
9. We request Tribal Authority not to continue serving the interests of the so called section 21 companies on our expenses
10. We also want to inform you that the section 21 company has been terminated to serve us any longer
11. We are sick and tired of the so called councillor in our village because he serves the interests of the mine
12. We inform you that he is no longer our councillor
13. We are sick and tired of you to allow the section 21 to come at Tribal Authority (Moshate) to talk about some of the community members
14. Stop eating the same cake with section 21 and serve the majority of the people
15. We also want to know about the MTN Aerial that has been structured at our village
16. What about the Eskom Poles that has been structured at our ploughing land
17. Why Tribal Authority (Moshate) are you quiet whereas some of the members of the community are harassed, shoot by members of the police
18. Never try to appoint a headman (Induna) for us
19. Avoid to be a dictator
20. Stop the friendship with your styn on our expenses
21. Why are you not coming to the community, whereas you know there is a crisis
22. Did you sign for the lease agreement? If not why are they working at our village?
23. The fine imposed on Mr Dan Motlana must be automatically cancelled with immediate effect.
24. We therefore request Tribal Authority (Moshate) to reply or respond within 14 days.

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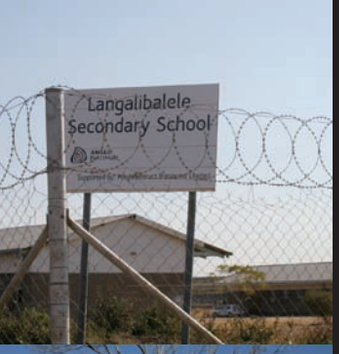

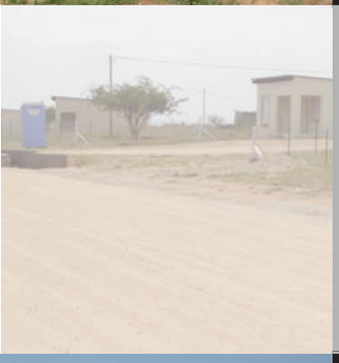

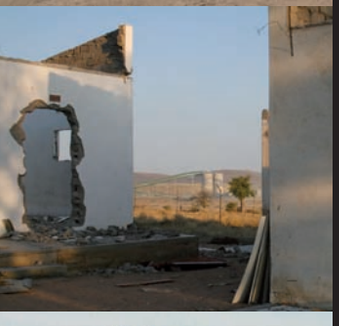

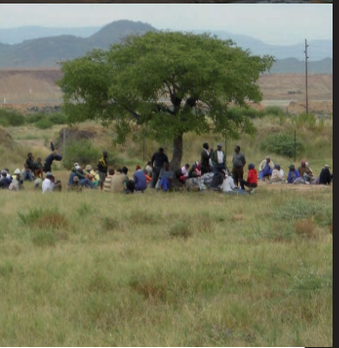

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